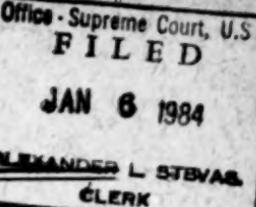


No. 83-876



In the Supreme Court of the United States

OCTOBER TERM, 1983

RAUL FREIRE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals, in reversing an order suppressing evidence, erred in ruling that *United States v. Ross*, 456 U.S. 798 (1982), applies retroactively and that two briefcases found in an automobile were lawfully searched.

On December 23, 1981, petitioners were charged in an indictment returned in the United States District Court for the Southern District of Florida with the following offenses: importing cocaine, in violation of 21 U.S.C. 952(a); conspiring to import cocaine, in violation of 21 U.S.C. 963; conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); and use of a firearm during the commission of a felony, in violation of 18 U.S.C. 924. Petitioners Pupo and Rubio were also charged with possession of cocaine, in violation of 21 U.S.C. 844(a).

On March 4, 1982, the district court suppressed as evidence the contents of two briefcases seized from an automobile that had been stopped by DEA agents. Relying upon principles governing searches incidental to arrest, the district court ruled that the search of the briefcases was unlawful because it did not occur until after petitioners Pupo and Rubio, the occupants of the automobile, were brought to DEA headquarters. The court of appeals reversed, finding that the agents did not violate the Fourth Amendment when they searched the briefcases. It rejected petitioners' arguments that the government's failure in the district court to rely on the automobile exception to the warrant clause as the justification for the search estopped it from asserting that argument on appeal. The court found that the search was lawful under the automobile exception and that the principles of *United States v. Ross* apply retroactively (Pet. App. 1-16; 710 F.2d 1515).

Petitioners contend (Pet. 4-7) that the government waived the right to justify the search of the briefcases under the automobile exception to the Warrant Clause by not asserting that position in the district court. They also contend (Pet. 7-8) that the agents improperly seized documents from the briefcases because the incriminating nature of these items was not immediately apparent, and that this Court should decide whether the principles of *Ross* were properly applied to their case. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.¹ The court of appeals' decision places petitioners in precisely the same position they would have occupied if the

¹It is now more than two years since the return of the indictment and 22 months since the district court's suppression order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioners.

district court had refused to suppress the evidence. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.²

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984

²Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.